

การบังคับใช้กฎหมายต่อต้านการข้ออ่าย่างร้ายแรงในญี่ปุ่น*

Enforcement of Hardcore Cartel in Japan

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บทคัดย่อ

การวิจัยนี้ศึกษาเกี่ยวกับประวัติความเป็นมาและการบังคับใช้กฎหมายการแข่งขันทางการค้าของประเทศญี่ปุ่น โดยมุ่งเน้นที่วิฒนาการของหลักกฎหมายการแข่งขันและการจัดการกับการข้ออ่าย่างร้ายแรง (Hardcore Cartel) เริ่มตั้งแต่ช่วงการฟื้นฟูเมืองลิ้งหลังสังคมโลกครั้งที่สอง มีการสำรวจการเปลี่ยนแปลงของกฎหมายทั้งน้ำดื่มและเศรษฐกิจของญี่ปุ่น โดยเฉพาะอย่างยิ่งการเน้นย้ำถึงการเปลี่ยนแปลงจากอุตสาหกรรมที่ควบคุมโดยรัฐบาลไปสู่สภาพแวดล้อมทางการตลาดที่มีการแข่งขันซึ่งได้รับแรงกระตุ้นจากการตราชูญหมายต่อต้านการผูกขาดซึ่งว่า Antimonopoly Act (AMA) ในปี ค.ศ. 1974 โดยได้รับอิทธิพลจากกฎหมายต่อต้านการผูกขาดของสหรัฐอเมริกา กฎหมายฉบับนี้ได้กำหนดการควบคุมที่เข้มงวดเกี่ยวกับการควบรวมกิจการ ห้ามมิให้มีการแบ่งแยกอำนาจทางเศรษฐกิจอย่างไม่สมเหตุสมผล และจัดตั้งคณะกรรมการการแข่งขันทางการค้าของญี่ปุ่นเป็นหน่วยงานบังคับใช้หลัก

การวิจัยฉบับนี้ได้มีการวิเคราะห์เชิงลึกเกี่ยวกับการบังคับใช้กับการข้ออ่าย่างร้ายแรงภายใต้กฎหมายต่อต้านการผูกขาดของญี่ปุ่น โดยเน้นที่ซึ่งเป็นความผิดทางอาญาและขั้นตอนการดำเนินการและพิจารณาคดีโดยเฉพาะ การศึกษานี้จะลึกซึ้งในการกระทำความผิดในการข้ออ่าย่างร้ายแรง และรูปแบบการบังคับใช้กฎหมายในทางอาญา นอกจากนี้ ยังตรวจสอบผลกระทบของการลงโทษทางอาญา โดยเน้นความเสี่อมเสียที่เกี่ยวข้องกับบุคคลที่ร่วมกระทำการต่อต้านการแข่งขันทางการค้า นอกจากนี้ การศึกษายังสำรวจขอบเขตการบังคับใช้กฎหมายในการจัดการกับความพยายามในการร่วมกันกระทำความผิด

จากการศึกษานี้ ได้นเน้นย้ำการบังคับใช้ของกฎหมายต่อต้านการผูกขาดของประเทศญี่ปุ่นในการส่งเสริมกฎหมายทั้งน้ำดื่มและเศรษฐกิจที่มีการแข่งขันทางการค้า ขณะเดียวกันก็ต่อสู้กับพฤติกรรมที่ต่อต้านการแข่งขันทางการค้าผ่านมาตรการบังคับใช้ที่เข้มงวด

คำสำคัญ : กฎหมายการแข่งขันทางการค้าญี่ปุ่น, การข้ออ่าย่างร้ายแรง, โทษทางอาญา

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Abstract

This study examines the historical development and enforcement framework of Japanese Competition Law, with a specific focus on the evolution of competition law principles and the handling of hardcore cartels. Beginning with the period following the Meiji Restoration up to the aftermath of World War II, the transition of Japan's economic landscape is explored, particularly highlighting the shift from government-controlled industries to a competitive market environment catalyzed by the enactment of the Antimonopoly Act (AMA) in 1974. Influenced by United States antitrust laws, the AMA imposed stringent controls on mergers, prohibited unreasonable economic power disparities, and established the Japan Fair Trade Commission (JFTC) as the primary enforcement body.

An in-depth analysis is provided on the enforcement of hardcore cartels under the AMA, specifically focusing on their criminalization and procedural aspects. The study delves into the limited prosecution of hardcore cartels and the utilization pattern of criminal enforcement strategies. Furthermore, it examines the implications of criminal sanctions, emphasizing the stigma and dishonor associated with individuals involved in anticompetitive activities. Additionally, the study explores and the broad scope of criminal punishment in addressing collaborative efforts.

Through this examination, the study underscores the AMA's enforcement in fostering a competitive economic landscape while combatting anticompetitive behavior through rigorous enforcement measures.

Keywords : Japanese Competition Law, Hardcore Cartels, Criminal Sanction

A. History and Enforcement Structure of The Japanese Competition Law

1. Concept and History of Competition Law and Hardcore Cartel

The concepts of “free enterprise” and “free competition” emerged relatively recently in the Japanese business community. Following the Meiji Restoration of 1868, Japan's primary goals were to learn from and match Western industrial prowess. To achieve this, the government implemented a vigorous industrial development program, exemplified by the creation of nationalized steel mills that later transitioned into the private sector as the Japan Steel Corporation.

During this period, the government enacted laws allowing the formation of cartels and trade associations, granting it substantial control over various industries to execute economic policies. Alongside stringent economic regulations, the pre-war economic landscape was characterized by “zaibatsu,” large industrial conglomerates. These zaibatsu, such as Mitsui, Mitsubishi, and Sumitomo, encompassed enterprises spanning banking, coal, steel, heavy

industry, trading, securities, and other sectors. These conglomerates were typically organized under a holding company's control.

For instance, in the Mitsui zaibatsu, the Mitsui Company's head office held a controlling interest in entities like Mitsui Trading Company and Mitsui Bank. By 1942, there were 17 zaibatsu combined significantly influencing various sectors of Japanese industry. Given the dominance of zaibatsu and the government's tight economic regulation, establishing conditions conducive to "free enterprise" or "free competition" was extremely challenging. Consequently, the eighty years from the Meiji Restoration to the conclusion of the Pacific War can be characterized as an era of government control.¹

Following World War II, Japan and its industries were nearly destroyed, necessitating a comprehensive rebuilding of its industrial environment. The Allied Occupation Forces, commanded by the United States, gained control of Japan with the goal of rebuilding its economy on the principles of economic democracy through the implementation of an "economic democratization policy."

This policy comprised three major components: (1) agricultural land reform, (2) labor legislation, and (3) the decentralization program, along with the enactment of the Antimonopoly Law. Agricultural land reform sought to eliminate absentee landownership, establishing a system where farmers owned and cultivated their own land. Labor legislation involved the introduction of significant laws such as the Labor Standards Law, the Labor Union Law, and the Labor Adjustment Law, which were pivotal innovations in Japan, albeit unrelated to antimonopoly measures.

The third crucial aspect of the Economic Democratization Policy was the dismantling of zaibatsu and the implementation of the Antimonopoly Law. As mentioned earlier, zaibatsu held immense power over the Japanese economy until the end of World War II. The Occupation Forces decided to disband the zaibatsu and recommended their dissolution through memoranda to the Japanese government. In response, Japan enacted the Law to Eliminate Excessive Concentration of Economic Power and issued decrees, leading to the division of many large zaibatsu companies into separate entities. For instance, Mitsubishi Heavy Industries, Ltd., was split into three entities, and the Japanese Steel Corporation was divided into two.

Moreover, the Japanese government moved to eliminate holding companies that served as the headquarters of many zaibatsu. This decentralization effort successfully reshaped the Japanese economy. In tandem with this, a fundamental law was deemed necessary to lay the groundwork for free competition among enterprises. Consequently, the Antimonopoly Act (AMA) was enacted in 1974, earning the moniker "the economic

¹ Mitsuo Matsushita, *Introduction to Japanese Antimonopoly Law* (Yuhikaku Publishing Co., Ltd. 1990) 1.

constitution” of Japan. This legislative framework marked a significant step towards establishing a competitive and open economic environment in post-war Japan.²

1. The Antimonopoly Act

The original Antimonopoly Act (AMA), designed after United States antitrust laws, possessed distinct features that set it apart from current legislation. This initial iteration of the AMA was robust in several respects:

1. **Stringent Control Over Mergers and Acquisitions:** The AMA imposed rigorous control over mergers and acquisitions, aiming to prevent the concentration of economic power and maintain a competitive business environment.
2. **Prohibition of Unreasonable Differences in Economic Power:** It prohibited unreasonable differences in terms of economic power among enterprises, aiming to foster fair competition and prevent the dominance of any particular entity.
3. **Limited Exemptions:** The legislation severely limited exemptions, signaling a commitment to broad and consistent enforcement of antimonopoly measures.

Additionally, the AMA established the Japan Fair Trade Commission (JFTC) as the enforcement agency for the statute. Initially, under the influence of the Allied Occupation Forces, the AMA was rigorously enforced in the years immediately following its enactment. However, starting around 1950, enforcement saw a sudden relaxation.³

This shift in enforcement was influenced by broader geopolitical considerations. The Truman Doctrine and the onset of the Korean War led to a change in U.S. policy toward Japan. The focus shifted from discouraging Japan’s resurgence as a major economic power to actively supporting its reconstruction into a heavily industrialized country. This transformation aimed to position Japan as a strategic ally against the spread of Communism. Given the challenging post-war circumstances and the need for rapid rehabilitation, enforcing a strong competition policy, as embodied in the original AMA, was considered unrealistic.

As a result, the AMA remained largely dormant until around 1960, marking a period of reduced emphasis on antimonopoly enforcement as Japan focused on its economic recovery and industrialization.

In Japan, cartels are prohibited under the second half of Article 3 of Law No. 54 of the AMA, characterized as an “unreasonable restraint of trade.” While the AMA lacks specific provisions regarding extraterritorial applicability, it is widely construed to be relevant to

² Ibid 2.

³ Ibid 3.

international cartels. Both the JFTC and the prevailing view in Japan affirm that the AMA is applicable to conduct beyond Japan's borders.⁴

The AMA has undergone multiple amendments for various reasons, notably concerning provisions related to cartels. The 1953 Amendment is recognized as an adjustment aimed at easing regulatory constraints. Specifically regarding cartels, exemptions were introduced for depression cartels and rationalization cartels under specified conditions, signifying a relaxation of the AMA's application to these categories of cartels.

The 1973 Oil Crisis marked a pivotal shift in AMA enforcement. The discovery of hidden cartels in the petroleum industry, engaged in price-fixing, triggered public outrage over private industry's price manipulations. In response, JFTC formed a task force to explore AMA amendments, aiming to enhance its effectiveness against economic concentration. Subsequent government intervention led to the 1977 AMA amendment, a landmark development as the first instance of amending the AMA to bolster its legislative strength in addressing anti-competitive practices.⁵

Regarding the 1977 AMA, the government introduced the administrative surcharge system. This timeline is noteworthy because, unlike many other competition regimes, Japan did not initially adopt criminal sanctions for supplementary deterrent value. Instead, the country initially relied on criminal fines as a deterrent measure. While mechanisms for private redress existed, they were infrequently utilized due to the considerable time and cost involved in pursuing damages. Initially, the surcharge system was primarily aimed at the disgorgement of illicit gains.

As previously mentioned, the original AMA classified cartels as "per se illegal." The 1953 amendment introduced a conditional prohibition, making cartels illegal only if they substantially restrained competition "contrary to the public interest." Notably, depression cartels and rationalization cartels were permitted under certain conditions. Despite these modifications, cartels continue to be a primary focus of prohibition under the statute.

According to the AMA, a cartel is defined as an agreement or understanding among competitors aimed at eliminating or restricting competition among themselves. Examples of cartel activities include price-fixing, production limitation, and market/customer allocation. Any such activity that significantly restrains competition and runs contrary to the public interest is deemed illegal under the AMA.⁶

⁴ Hideto Ishida and Etsuko Hara, 'Japan: Cartels' (*Global Competition Review*, 20 February 2015) <<https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/the-asia-pacific-antitrust-review-2015/article/japan-cartels>> accessed 18 April 2024.

⁵ Mitsuo Matsushita (n 1) 1.

⁶ Masako Wakui and Jonathan Galloway, 'The Japanese Cartel Fining System: The 2019 Amendments and Its Real Issue' (SSRN, 27 September 2020) <<https://ssrn.com/abstract=3672871>> accessed 20 April 2024.

In 1991, the turnover amount rose to 6%, and by 2005, it further increased to 10%.⁷ The introduction of the leniency system accompanied the reform of the surcharge system in 2005 through an amendment to the AMA. This amendment not only raised the surcharge calculation rate but also led to a rapid increase in the number of leniency applications. However, it is noteworthy that the current trend indicates a slight decline in the number of leniency applications.⁸

Recently, the AMA was successfully passed by the Diet on March 19, 2019, and it came into effect on December 25, 2020. The amendment primarily focuses on reforming the leniency system and enhancing the surcharge system. As per the AMA, the surcharge amount, which functions as an administrative fine, is determined by multiplying the relevant turnover by a fixed percentage, typically ten percent for cartel cases. Prior to the 2019 AMA Amendments taking effect, the surcharge calculation was applicable to up to three years of relevant turnover. However, with the amendment, this period is extended to up to ten years.

The Amendments also introduce changes such as the expansion of turnover subject to surcharge calculation, considerations for related business, granting the JFTC authority to estimate turnover, and adjustments to the percentage used in surcharge calculation. Notably, lower percentages previously applicable to retailers and wholesalers will be eliminated under the revised regulations.⁹

2. Organization of the Japan Fair Trade Commission

The Japan Fair Trade Commission (JFTC) is the enforcement agency established by the AMA. Although formally part of the Prime Minister's Office, it functions as an independent administrative commission. The JFTC comprises a Chairman and four commissioners, all appointed by the Prime Minister with the approval of both the House of Representatives and the House of Councilors.

“Article 28 The chairman and commissioners of the Fair Trade Commission exercise their authority independently.”¹⁰

⁷ Masako Wakui and Jonathan Galloway, ‘The Japanese Cartel Fining System: The 2019 Amendments and Its Real Issue’ (2020) Asian Competition Law Review 8.

⁸ Hideto Ishida and Etsuko Hara, ‘Japan: Cartels’ (*Global Competition Review*, 20 February 2015) <<https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/the-asia-pacific-antitrust-review-2015/article/japan-cartels>> accessed 18 April 2024.

⁹ Masako Wakui and Jonathan Galloway, ‘The Japanese Cartel Fining System: The 2019 Amendments and Its Real Issue’ (SSRN, 27 September 2020) <<https://ssrn.com/abstract=3672871>> accessed 11 March 2024.

¹⁰ The Antimonopoly Act, ‘Article 28 (1947)’ (*The Japan Fair Trade Commission*) <https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html> accessed 5 March 2024.

Article 28 of the AMA emphasizes the functional independence of the Chairman and commissioners, stipulating that directives from higher administrative levels cannot be issued to the JFTC, except in cases of judicial review.¹¹

The powers wielded by the JFTC are categorized into three main types:

(1) Administrative

The administrative powers of the JFTC encompass activities such as approving or licensing specific agreements for exemption from the AMA application, conducting consultations with and making requests to other government agencies, and engaging in economic research. Noteworthy instances of licensing power include approving depression cartels and rationalization cartels under Articles 24-3 and 24-4 of the AMA.

Various sections of the AMA outline reporting requirements, such as Article 8(2) mandating trade associations to report their establishment, Article 6(2) necessitating enterprises to report designated international agreements, and Article 15(2) requiring pre-notification for mergers. The JFTC is responsible for reviewing submitted reports and taking necessary measures as per the AMA.

Other statutes that exempt certain activities from AMA application often involve consultation, notification, or consent by the JFTC. For example, the Export/Import Transactions Law, which exempts export and import cartels from the AMA, stipulates that the Ministry of International Trade and Industry (MITI) must consult with the JFTC when approving such cartels. In these cases, the JFTC provides its perspective and endeavors to integrate competition policy considerations into enforcement agency decisions. There are provisions where the JFTC may inform the enforcement agency that the prerequisites for approving a particular cartel under a specific statute have ceased to exist, prompting a request for the revocation of the approval. Article 34(9) of the Export/Import Transactions Law exemplifies such a provision.

To complement AMA enforcement, the JFTC has issued numerous guidelines on various matters. Based on these guidelines, the commission establishes informal regulations through administrative guidance, forming a crucial aspect of the JFTC's administrative powers.

(2) Quasi-Legislative

The National Diet holds legislative authority; however, certain provisions within the AMA grant the JFTC expansive rule-making powers, resembling legislative authority. This authority is colloquially termed the JFTC's "quasi-legislative power."

Key provisions related to this power include Article 2(9), conferring authority upon the JFTC to designate unfair business practices. According to this provision, an unfair business

¹¹ Mitsuo Matsushita (n 1) 79.

practice is not inherently prohibited by law unless the JFTC issues a specific designation to that effect. Similarly, Article 24-2 empowers the JFTC to designate goods for which resale price maintenance is exempted from AMA application. Under this provision, the JFTC designates specific consumer goods as exempted items. While resale price maintenance is generally considered unlawful, this designation serves to exempt certain activities from the statutory application.

In both instances, the AMA does not outright prohibit an activity unless the JFTC designates specific conduct as contrary to the statute. Therefore, actions taken by the JFTC effectively create a legal prohibition, illustrating the quasi-legislative nature of its rule-making powers.

(3) Quasi-Judicial

The JFTC also initiates an investigation, conducts an administrative hearing, and subsequently issues a decision that forms the basis for a cease-and-desist order. This outlines the fundamental procedure employed by the JFTC in handling cases.

The JFTC's authority in this process is characterized as "quasi-judicial" since it essentially involves an adversarial process with an investigating attorney and the respondent. The proceedings are presided over by a hearing examiner, resembling a court proceeding in this regard. The quasi-judicial power grants the JFTC the ability to conduct hearings, render decisions, and issue cease-and-desist orders as part of its enforcement measures.¹²

1. Investigation

In the event of sufficient evidence warranting an investigation, the JFTC commences the procedure. The AMA outlines three circumstances that may trigger an investigation: (1) the submission of a report by an individual aware of a violation, (2) notification from the Prosecutor General to the JFTC, and (3) notification from the Director General of the Small Business Agency. Additionally, the JFTC may initiate its inquiry. Article 45 of the AMA allows any person aware of an AML infringement to report it to the JFTC with supporting evidence, prompting an investigation. However, it's important to note that the JFTC is not obliged to pursue legal action based on such reports; thus, Article 45 does not grant private parties the right to file lawsuits but serves as a means to provide information to the JFTC. Article 74 mandates the Prosecutor General to inform the JFTC of AMA violations discovered during a criminal investigation, though this provision is infrequently utilized in practice. Furthermore, Article 3 of the Law to Establish the Small Business Agency grants the Director General of the Agency the authority to notify the JFTC of AMA violations within his

¹² Ibid 79-81.

awareness. Apart from these channels, the JFTC may become aware of violations through routine surveillance conducted by the commission.¹³

2. Hearing

The initiation of an administrative hearing involves serving the respondent with a copy of the complaint. The appointed investigating attorney from the JFTC presents evidence and legal arguments, while the respondent, typically represented by a lawyer, presents its case concerning facts and the application of the law. Although the Commission typically oversees the hearing, it may appoint a hearing examiner from the officials of the Secretariat to preside over a case. In most instances, a hearing examiner conducts the proceedings. Upon the conclusion of the hearing (excluding cases presided over by the Commission), the hearing examiner formulates a draft decision and shares it with the respondent. This draft, along with the case records and any objections from the respondent, is submitted to the Commission. The Commission reviews the material and determines whether the alleged conduct constitutes a violation of the AMA. If a violation is established, the JFTC issues a decision mandating the respondent to cease and desist from the specified conduct.

3. Consent Decision

Once a hearing has begun, the party under investigation has the option to acknowledge the facts and legal interpretations outlined in the complaint. They can then suggest corrective actions to address the identified illegality. Upon evaluating the proposed measures, if deemed acceptable, the JFTC has the authority to conclude the hearing and issue a decision that includes the agreed-upon proposal.

B. Enforcement Criminalization of Hardcore cartel in the Japanese Context

1. Criminal Procedure

Article 89 outlines criminal penalties for offenses such as private monopolization, hardcore cartel, and trade association actions that substantially limit competition. Additionally, Article 90 establishes criminal penalties for illegal international contracts, trade association constraints on membership numbers and activities, and non-compliance with final and binding decisions of the JFTC. Various other provisions prescribe criminal penalties for illicit stockholding activities, related violations, and failures to comply with filing requirements. However, it's important to note that no criminal penalties are stipulated for unfair business practices. This absence is justified by the perception that unfair business practices are not regarded as gravely serious as offenses involving private monopolization or hardcore cartels.

¹³ Ibid 81.

Article 96 specifies that for a criminal indictment to be initiated by the public prosecutor, the Fair Trade Commission (FTC) must first file an accusation against an infringer with the Public Prosecutor. Investigators of the JFTC authorized by the AMA carry out the searches. If other crimes are involved, however, the police agency and/or public prosecutors may conduct their own investigation in accordance with the Criminal Procedure Law at the same time.¹⁴

2. The Limited Prosecution of Hard-Core Cartels

In the context of the AMA of Japan, criminal punishment primarily targets hard-core cartels, potentially involving private monopolization and communication among specific firms. Based on past experiences, only a limited number of hard-core cartels have been prosecuted as criminal cases.

In recent criminal cases, the court has specifically highlighted two factors in its judgments. Firstly, there is an emphasis on a perceived insufficient level of compliance spirit, suggesting that companies involved in these cases did not demonstrate a strong commitment to adhering to antimonopoly regulations. Secondly, the court has pointed to the active involvement of individuals in employing various strategies and tactics as contributing factors leading to the imposition of criminal punishment. These factors indicate that the court considers intentional and strategic actions by individuals, coupled with a lack of a robust compliance culture, as significant elements in determining criminal liability in antimonopoly cases.¹⁵

In summary, the number of cases that go to court in Japan, specifically regarding hardcore cartels potentially involving private monopolization and communication among certain firms, is relatively low. The focus on hardcore cartels in criminal cases is acknowledged, and the statement suggests that such cases are limited in number. Additionally, the criteria for criminal punishment in recent cases appear stringent, with an emphasis on compliance levels and active strategies employed by individuals.

Several examples of cases are as follows:

- 1.) The two companion rulings in the Petroleum Cartel case, issued on September 26, 1980, represent the most significant scrutiny of administrative practices in postwar Japan. In one judgment, the Tokyo High Court investigated the regulation of production volumes by a trade association, involving officials from the Ministry of International Trade and Industry (MITI). While the Petroleum Association and its officers were

¹⁴ Mitsuo M. and Eriko W., 'Japan' in Maher M. Dabbah and Barry E. Haw. (eds.) *Anti-Cartel Enforcement Worldwide: Antitrust and Competition Law* (Cambridge University Press 2019) 681.

¹⁵ Takayuki Suzuki, 'The Function of Criminal Punishment under the Antimonopoly Act of Japan' (2011) 2(1) *New Journal of European Criminal Law* 45-58.

acquitted, the case gained importance due to the court's determination that certain administrative practices by MITI officials were illegal. In the second ruling, the court found twelve companies and fourteen individuals involved in the wholesale of petroleum products guilty of price-fixing on five occasions in 1973, breaching article 8 (1)(1) of the AMA. Unlike the first case, where MITI officials played a significant role, here the defendants were found to have fixed prices independently. This had significant implications for Japan, particularly in terms of antitrust enforcement and regulatory practices. This ruling marks the first instance in which a Japanese court deemed a price-fixing cartel unlawful, subjecting its participants to criminal penalties. The prosecution and conviction of the companies and individuals involved in price-fixing sent a clear signal to other businesses in Japan that engaging in cartel behavior would have serious consequences. (Oil Cartel Criminal Case, The Tokyo District Court Decisions of Sep. 26, 1980)¹⁶

- 2.) In the waterworks meter manufacturing industry, where the JFTC twice exposed bid-rigging, the manufacturers were convicted of bid-rigging in 1997. In the case of the third bid-rigging in 2002, the responsibility of the companies and the individuals was very heavy, because they had repeated similar anticompetitive conduct more deviously in spite of awareness of the previous crime. The JFTC investigated a bid-rigging case concerning water meters purchased by the Tokyo Metropolitan Government, and in July 2003 filed an accusation based on Section 73-1 of the Antimonopoly Act with the Public Prosecutor General against four companies and five individuals who were engaged in the sale of water meters purchased by the Tokyo Metropolitan Government. The Tokyo High Court sentenced 5 accused persons to 12-14 months imprisonment with a three-year stay of execution and 4 accused companies to fines of 20-30 million yen (Bid-rigging of waterworks meters to Metropolitan Tokyo, Tokyo District Court Decisions of Mar. 26, Apr. 30 and May 21, 2004)
- 3.) The firms persisted in bid-rigging activities, despite being aware of their illegality and having the opportunity to cease their anticompetitive behavior when the JFTC investigated another division of their company. The JFTC determined that the bidders collaborated to select the prospective bid winner, with the aim of preventing a decline in contract prices for human waste treatment facilities projects procured by municipal governments and other parties. Consequently, on January 16, 2007, the JFTC issued cease and desist orders and surcharge payment orders, as such actions violate Article

¹⁶ Repeta, L. 'The Limits of Administrative Authority in Japan: The Oil Cartel Criminal Cases and the Reaction of MITI and the FTC' (1982) 15 Law Japan 24.

3 of the AMA (Bid-rigging of human waste treatment facilities to local communities, Osaka District Court Decisions of Mar. 12, Mar. 15, and May 17, 2007)¹⁷.

4.) The culmination of a significant case involving three galvanized steel sheet companies and six former sales executives found guilty of violating The AMA through participation in a price-fixing cartel. The prosecution, based on evidence provided by the JFTC, revealed that representatives from Nissin Steel Co., Ltd., Yodogawa Steel Works, Ltd., Nippon Steel & Sumikin Coated Sheet Corporation, and JFE Galvanizing & Coating Co., Ltd., conspired to increase the sales price of galvanized steel sheets by 10 yen per kilogram between April 2006 and June 2006. This collusion, controlling approximately 90% of the Japanese galvanized steel sheet market, significantly restrained competition as alleged by the JFTC. The investigation, prompted by a leniency application from JFE, led to criminal accusations against the companies and former executives in November 2008. The ensuing legal proceedings resulted in unprecedented fines totaling over 15.5 billion yen and prison sentences ranging from ten months to a year for the executives. Notably, this case showcased the JFTC's exercise of its new authority for compulsory investigations, resulting in the first criminal cartel accusation in over 17 years. Additionally, it highlighted the efficacy of the antitrust leniency program, sparing JFE and its employees from prosecution. This case underscores the increasing severity of penalties for antitrust violations in Japan, aligning with legislative amendments aimed at deterring such illegal practices (E-raising cartel of plating steel plates, Tokyo District Court Decision of Sep. 15, 2009).¹⁸

C. The Utilization Pattern of Criminal Enforcement

1. The Essence and Function of Criminal Sanction

The JFTC enforces surcharge payment orders on corporations through administrative procedures, while criminal penalties are imposed on both individuals and corporations by the Court. Criminal proceedings are initiated by the public prosecution with written accusations from the JFTC. Both actions impose disadvantages on the culpable parties, highlighting a distinction between administrative and criminal sanctions.

Criminal penalties exhibit distinct traits, including the so-called stigma effect, which solidifies specific forms of anti-competitive behavior as absolute wrongs within our economic society governed by the principles of a free market mechanism. Additionally, there is a sense

¹⁷ Takayuki Suzuki (n 15) 54.

¹⁸ Yoji Maeda, 'The Tokyo District Court fines three galvanized steel sheet companies and six former sales executives guilty of violating Japan's Antimonopoly Act for participating in a price-fixing cartel (Nissin / NSS / JFE)' (Concurrences, 15 September 2009) <<https://www.concurrences.com/en/bulletin/news-issues/september-2009/The-Tokyo-District-Court-fines>> accessed 15 April 2024.

of dishonor associated with individuals found guilty of neglecting their corporate responsibilities. The potency of criminal punishment in influencing violators surpasses that of administrative sanctions, establishing it as the most stringent measure against anticompetitive actions.¹⁹

Criminal punishment, particularly through imprisonment, is a unique avenue that specifically targets individuals. This punitive measure involves taking away a portion of their valuable and limited lifespan, isolating them from general society, and widely publicizing their social guilt. Although it cannot be applied to corporations, imprisonment compels individuals to distance themselves from their professional networks, communities, and families. The fundamental essence of criminalization lies in the imposition of imprisonment. The severity of imprisonment for white-collar offenders results in pronounced stigma effects and feelings of dishonor to their personal lives. Additionally, these individuals, along with those around them, inevitably experience dishonorable feelings during the investigative process before the judgment leading to imprisonment. As a result, a key characteristic of criminal punishment lies in its ability to scrutinize individual responsibility and administer imprisonment as a consequence.²⁰

Based on the preceding information, two key points emerge regarding the role of criminalization in the AMA.

First, the expectation is that the Court, through the Public Prosecutor's Office, will resort to criminal punishment when an administrative order from the JFTC lacks a sufficient deterrent impact. The JFTC's policy statement, titled "The JFTC's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases regarding Antimonopoly Violations" (14), specifies that criminal charges are deemed appropriate for cases considered vicious and serious, with widespread influence on people's lives or involving firms or industries with a history of violations or non-compliance with elimination orders.

Secondly, the initiation of criminal proceedings against anticompetitive cases is deemed appropriate when an individual's actions carry personal criminal liability.²¹

2. Criminal Sanctions and Hardcore Cartel

Hard-core cartels, which may warrant criminal punishment, involve collaborative crimes that require accomplices. It is important to explore the connections among these accomplices as they organize and sustain a hardcore cartel. The accomplice relationships in a hardcore cartel can be viewed from three dimensions.

¹⁹ Takayuki Suzuki (n 15) 45-58.

²⁰ Ibid 43-44.

²¹ Ibid 45-46.

First, there exists an external joint relationship among the participating firms in the hard-core cartel.

Secondly, an internal joint relationship exists among the staff within a firm, particularly between a superior and their staff.

Thirdly, a collaborating joint relationship emerges when an external party attempts to facilitate a hard-core cartel, such as leaking confidential information to a specific bidder from an administrative agency conducting a public bid.

Criminal punishment can address the limitations of administrative measures, which only reveal external joint relationships among cartel participants, as these measures primarily target corporate entities. Criminal punishment has a broader scope, reaching internal joint relationships and collaborative efforts, as its primary focus is on individuals. This perspective reveals that hard-core cartels can be considered large-scale organized offenses.²²

In Summary

The evolution of Japanese Competition Law from the Meiji Restoration to the present day has witnessed significant transformations. The post-war era saw the enactment of the AMA and the dismantling of zaibatsu conglomerates, laying the foundation for a more competitive economic landscape. Subsequent amendments to the AMA have aimed at strengthening enforcement mechanisms, particularly against cartels. The recent 2019 AMA Amendments further enhanced the regulatory framework, focusing on reforming the leniency system and bolstering the surcharge system. Overall, these legislative developments reflect Japan's commitment to promoting fair competition and economic growth while addressing anti-competitive practices.

JFTC, established under the AMA, operates independently within the Prime Minister's Office. It consists of a Chairman and four commissioners, appointed by the Prime Minister with approval from both legislative houses.

Regarding the enforcement of criminal penalties under the AMA, the primary focus is on hardcore cartels, with limited prosecutions observed in recent cases. Key factors contributing to criminal liability include a lack of compliance spirit among companies and the active involvement of individuals in anti-competitive strategies. Despite occasional prosecutions, the overall number of cases involving hardcore cartels remains relatively low in Japan.

Criminal enforcement under the AMA plays a vital role in deterring anti-competitive behavior, particularly concerning hardcore cartels. Criminal penalties, including imprisonment,

²² Ibid 45-58.

carry significant stigma and dishonor, making them potent deterrents against violations. The utilization pattern of criminal enforcement focuses on cases deemed serious and impactful, targeting both corporate entities and individuals involved in anti-competitive activities. Furthermore, criminal punishment addresses the complex network of relationships within hardcore cartels, highlighting its effectiveness in combating organized anti-competitive behavior at both the corporate and individual levels.